Supreme Court, U.S.
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No. 92-1723

In The

Supreme Court of the United States

October Term, 1992

CORNELL WILLIAMS, et al.,

Petitioners,

vs.

ORANGE COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES G. BURR
Counsel of Record
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

A. BRYANT APPLEGATE
Orange County Legal Department
201 S. Rosalind Avenue
5th Floor
Orlando, Florida 32801
(407) 836-7320

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the district court properly enter summary judgment in favor of the respondents, when the petitioners failed to proffer any probative evidence demonstrating the existence of a genuine issue of material fact concerning either vote dilution or intentional discrimination against African-American voters?

2. Did the district court deprive the petitioners of an opportunity to proffer evidence in support of their claims?

3. Does the Eleventh Circuit's decision, which affirmed the district court's entry of summary judgment in favor of the respondents, conflict with the decisions of other circuits?

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CITATIONS TO OPINIONS BELOW

The district court's opinion, which entered summary judgment in favor of the respondents, is reported at 783 F. Supp. 1348 (M.D.Fla. 1992).

The opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's opinion, is reported at 979 F.2d 1504 (11th Cir. 1992).

STATEMENT OF THE CASE

A. Statement Of Facts And Disposition By The Courts Below

This lawsuit was filed as a class action in July 1990 by the petitioners, a group of African-American voters in Orange County, Florida [R.1]. The lawsuit alleges that the county's system for electing members of the Board of County Commissioners ("BOCC") violates Section 2 of the Voting Rights Act of 1965 ("Section 2") by diluting the voting strength of African-Americans, and violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States because it was created and is operated with discriminatory intent.

The challenged election system provides for six members of the BOCC to be elected from single-member districts and one member, who serves as chairperson, to be elected at-large ("the 6-1 system"). The 6-1 system was implemented in November 1988. It replaced a system under which five members of the BOCC all were elected at-large. The feature of the 6-1 system that is the focus of

the petitioners' challenge is the at-large election of the BOCC's chairperson.

Throughout the mid-1980s, there was extensive public debate about the best way to reform the old, all-at-large system. In April 1986, the BOCC established a Citizens Charter Government Study Committee ("CCGSC") to investigate the adoption of a home rule charter[1] for Orange County and various other issues, including alternative ways of electing BOCC members. The CCGSC's final report included a recommendation for the adoption of a home rule charter, and a recommendation that the November 1988 general election include a referendum on whether BOCC members should be elected from single-member districts. [R.79]. The BOCC accepted both recommendations. Thus Orange County began operating under a home rule charter on January 1, 1987.

In August 1987, the BOCC created a 15-member Charter Review Commission ("CRC") to study ways to improve the newly-adopted home rule charter. Two of the 15 members were African-Americans. There was an ongoing debate among the CRC members about the form of the proposition or propositions that would be placed before the county's voters in the November 1988 referendum on the issue of single-member district elections. In its final report, the CRC voted in favor of placing two propositions on the ballot, one of which called for the adoption of a system with five single-member districts, and the other which called for adoption of the 6-1 system.

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[1] Article VIII, Section 1(c) of the Florida Constitution and *Fla. Stat.* Chapter 125, Parts II and IV (1974) provide for the adoption of home rule charters by Florida's counties.

The vote of the CRC in favor of placing these two propositions on the ballot was 13 in favor and two opposed. Both of the African-American members voted in favor. [R.79; R.100-16, 18].

In the November 1988 referendum, both propositions received a majority of "yes" votes. [R.79; R.100-4]. A substantial majority of Orange County's African-American voters cast their votes in favor of the 6-1 system. The CRC's legal counsel opined that the "yes" vote in favor of the 6-1 system took precedence over the "yes" vote in favor of the system with five single-member districts. [R.79; R.100-4]. The result was Orange County's adoption of the 6-1 system for electing BOCC members.[2]

In January 1989, the BOCC created the Orange County Redistricting Advisory Committee ("RAC"), which was charged with the responsibility of dividing the county into six county commission districts. The RAC drew the district lines in a manner designed to maximize the opportunity of African-American voters to elect a candidate of their choice in at least one of the newly-created districts. [R.79, Appendix Vol. I, Exhibits A and G].

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[2] A state court lawsuit was filed challenging the procedure used by Orange County to implement the 6-1 system. The trial court ruled in favor of the county, finding that "the [referendum] election was free and fair . . . [and] the two propositions, as presented, were not inconsistent and the passage of both propositions amounted to a choice by the electorate to enact [the 6-1 system]." *Orange County Political Coalition, Inc. v. Orange County Election Board*, Circuit No. CI88-8114. The plaintiffs appealed. On April 3, 1990, the Fifth District Court of Appeal of Florida issued a *per curiam* affirmance of the trial court's ruling.

The first elections for BOCC members under the 6-1 system were scheduled for the fall of 1990. [R.2, 3, 4]. When the petitioners filed their lawsuit in July 1990, they sought to enjoin the elections. After hearing arguments on the petitioners' motion [R.35], the district court declined to issue an injunction. [R.45].

The 1990 elections were held as scheduled. They resulted in the election of an African-American – the BOCC's first – from one of the single-member districts, and the at-large election of a white chairperson with substantial support from African-American voters. [R.79, Appendix Vol. II].

Meanwhile, the litigation continued. In September 1991, the petitioners filed a motion pursuant to Fed.R.Civ.P. 26(f) seeking a discovery conference. [R.65]. The respondents opposed the motion on the ground that the petitioners were merely seeking to re-argue discovery issues that already had been resolved against them. [R.67]. On October 3, 1991, the United States Magistrate entered an order denying the petitioners' request for a conference. [R.68]. The petitioners appealed to the district court [R.73], which upheld the Magistrate's ruling. [R.99].

On November 15, 1991, the respondents filed their summary judgment motion. [R.79, 80]. The motion asserted that the petitioners could not prevail on their vote dilution claim under Section 2 because they could not proffer any probative evidence of racial bloc voting, as required by the Supreme Court in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986). The respondents also asserted that the petitioners could not proffer any probative evidence

that the 6-1 system was either created or maintained with discriminatory intent in violation of the Fourteenth and Fifteenth Amendments.

Pursuant to the district court's local rules, the petitioners were required to respond to the respondents' summary judgment motion within 10 days. However, on December 5, 1991, the district court entered an order giving the petitioners an additional 25 days. [R.85]. Thus the petitioners had a total of 35 days to respond.

In response to the summary judgment motion, the petitioners filed a motion pursuant to Fed.R.Civ.P. 56(f)[3] seeking a delay in order to conduct additional discovery for use in opposing summary judgment. [R.87]. The petitioners did not respond on the merits.

On January 31, 1992, the district court[4] entered an order denying the petitioners' Rule 56(f) motion and entering summary judgment in favor of the respondents. [R.100]. Judgment was entered on February 3, 1992. [R.101]. The petitioners filed a motion to alter or amend the judgment, which was denied. [R.107].

The petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. On December 28,

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[3] The petitioners' motion also sought unspecified relief under Fed.R.Civ.P. 56(e). The petitioners have acknowledged that the reference to Rule 56(e) was a mistake. Petition at 39-40.

[4] On November 15, 1991, the presiding district judge assigned the case to a visiting judge, James L. Watson, for trial. [R.82].

1992, the Eleventh Circuit issued a *per curiam* affirmance of the district court's ruling.

B. Misstatements Of Fact In The Petition

The Petition for a Writ of Certiorari contains a number of misstatements of fact. Pursuant to the directive of Supreme Court Rule 15, the misstatements are itemized as follows:

1. The petitioners allege that "the [home rule] charter was intended to avoid a state-imposed county commission election system which would assure a meaningful voting opportunity for blacks." Petition at 19.

There is no evidence in the record supporting this allegation. In fact, the district court found that "[the respondents] have convincingly demonstrated that the 6-1 system was *not* created and is *not* operated for a discriminatory purpose. [Petitioners] have failed to respond with *any* fact indicating the existence of a genuine issue with respect to intentional discrimination." 783 F. Supp. at 1354 (emphasis supplied). On appeal, the Eleventh Circuit adopted this finding. 979 F.2d 1504.

2. The petitioners allege that "[w]hites who long controlled politics in Orange County sought a system to preserve their rule." Petition at 19.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

3. The petitioners allege that " . . . the white county leadership was united in resistance to a Florida mandate

for county commissioners to be elected from individual districts in which they resided. . . . " Petition at 19.

There is no evidence in the record supporting this allegation. In fact, the record shows that of the 13 white members of the CRC, 11 voted in favor of placing two propositions on the November 1988 referendum ballot which would allow for single-member district voting. [R.79; R.100-16, 18].

4. The petitioners allege that " . . . the all-white Orange County Commission proposed avoiding the state-mandated commission election system alternatives by securing home rule through enactment of a charter." Petition at 21.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

5. The petitioners allege that "[i]n Orange County, there is minimal personal contact between the black and white citizenry." Petition at 27-28.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

6. The petitioners allege that "[u]npleasant news about racial or economic disparity understandably was not, is not welcomed in Orange County." Petition at 31-32.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

7. The petitioners allege repeatedly that they were denied an opportunity to proffer evidence in opposition to the respondents' summary judgment motion. For

example, the petitioners assert that they " . . . found themselves on the street again without a day in court," Petition at 32; that the district court's hearing on the respondents' motion for preliminary injunction was " . . . the last chance counsel were afforded to be heard by any jurist," Petition at 36; that unless this Court reverses the decisions of the courts below, " . . . [the petitioners'] right to be heard in open court about the 6-1 county commission election system [will be] lost forever," Petition at 44; that the district court " . . . expedite[d] the matter away from court without any evidentiary opportunity," Petition at 55; that the petitioners "were never given a chance to present evidence . . . on the motion for summary judgment," Petition at 57; and that "[the] certified class of tens of thousands of black citizens has been given no opportunity to be heard," Petition at 59.

These assertions grossly mischaracterize the district court proceedings. In fact, the petitioners had 17 months within which to complete their discovery prior to the filing of the respondents' summary judgment motion. Once that motion was filed, the petitioners had a total of 35 days within which to proffer evidence creating a genuine issue of material fact concerning their claims. They were unable to proffer any such evidence. Instead, they sought a delay in order to conduct additional discovery. The district court rejected that request, finding that

> [Petitioners] have given no reason why, in more than one year of discovery and one month from the filing of the motion for summary judgment, they could not procure affidavits going to the elements of their case.

On appeal, the Eleventh Circuit adopted this finding. 979 F.2d 1504.

SUMMARY OF THE ARGUMENT

The petitioners seek to involve this Court in a review of one of the most well-settled principles of federal jurisprudence, namely, that a district court properly can enter summary judgment against a party who, after ample discovery, is unable to proffer any evidence in support of its claims. In this case, the petitioners were unable to proffer any such evidence, resulting in the entry of summary judgment against them. On appeal, the Eleventh Circuit affirmed.

Now the petitioners attempt to assert facts that are not in the record, to attack the sufficiency of the respondents' proof in support of their summary judgment motion, and to quibble about the district court's rulings on discovery and evidentiary issues. These are not matters of national importance that require this Court's attention.

The petitioners also argue that the Eleventh Circuit's *per curiam* affirmance of the district court's disposition of this case places the Eleventh Circuit in conflict with a 1990 decision of the Ninth Circuit and a 1987 decision of the Fifth Circuit. The petitioners, however, have misconstrued the decisions of the latter two courts and have ignored a 1992 decision of the Ninth Circuit that is directly contrary to their asserted position. There simply is no conflict between the decisions of those courts and the Eleventh Circuit's decision in this case.

ARGUMENT

A. The District Court Properly Entered Summary Judgment Against The Petitioners On Their Constitutional Claims

The petitioners argue that because this case includes allegations of intentional discrimination, they are entitled to a trial on the merits of those allegations. Petition at 44-47. The petitioners' argument, however, is misplaced. It overlooks the fundamental purpose of Fed.R.Civ.P. 56, which is to test the factual foundation of claims in order to determine whether there is a basis for trial. *Jackson v. Werner*, 394 F. Supp. 805 (W.D.Pa. 1975)("[s]ummary judgment is a method of testing whether there is any real basis for relief"); *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 25 (D.Ore. 1966)(Rule 56 has "the express purpose of forcing the [party opposing the motion] to show his hand and present facts which would justify a trial on that issue").

Citing *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the petitioners assert that the foregoing principle does not apply to voting rights cases in which allegations of intentional discrimination have been made. The petitioners, however, misconstrue *Garza*. Nothing in *Garza* limits the manner in which summary judgment procedures can be applied to voting rights claims arising under the Fourteenth and Fifteenth Amendments.

Moreover, the facts of *Garza* clearly are distinguishable from the facts of the instant case. In *Garza*, the Ninth Circuit stated:

> The district court found persuasive the evidence showing that the Board had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971. The district court further found that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future.

Id. at 766. By contrast, the district court in the instant case found that the petitioners had failed to proffer *any* probative evidence of intentional discrimination.

If there was any room for reasonable doubt after *Garza* that summary judgment could be applied to intentional discrimination claims in voting rights cases, that doubt was dispelled by the Ninth Circuit in *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992). The plaintiffs in *Valladolid*, like the petitioners in the instant case, asserted claims under both Section 2 *and* the Fourteenth Amendment. The district court entered summary judgment in favor of the defendant municipality on the plaintiffs' Fourteenth Amendment claim. On appeal, the Ninth Circuit affirmed, stating:

> . . . [T]he appellants have presented *no evidence* that the City's at-large system bears more heavily on Hispanics and blacks than on other voters in the City, and they have *failed to point to anything else*, be it in the form of direct or circumstantial evidence, which creates an inference of discriminatory intent in the City's utilization of the at-large system.

Id. at 1298 (emphasis supplied). Thus, on virtually identical facts, the Ninth Circuit reached the same conclusion as the Eleventh Circuit in the instant case.

It is readily apparent that there is not, as claimed by the petitioners in the instant case, any conflict between the Ninth and Eleventh Circuits on the issue of whether summary judgment can be used to dispense with claims of intentional voting discrimination that are unsupported by any probative evidence.

B. The District Court Properly Entered Summary Judgment Against The Petitioners On Their Claim Under The Voting Rights Act

The respondents' summary judgment motion on the petitioners' Section 2 claim was supported in part by the affidavit of an expert statistician, Dr. Michael Maggiotto. [R.79, Appendix Vol. I, Exhibit H]. Dr. Maggiotto's affidavit summarized his analysis of the election results for all BOCC contests between 1980 and 1990 ("the endogenous contests"), and all contested elections for other county offices between 1980 and 1990 in which at least one African-American candidate opposed at least one white candidate ("the exogenous contests"). Dr. Maggiotto's analysis showed an absence of racial bloc voting in Orange County elections. 783 F. Supp. at 1359.

The petitioners proffered no rebuttal evidence on the racial bloc voting issue. As a result, the district court found that the petitioners had failed to satisfy the third precondition for maintaining a vote dilution case under Section 2, *see Thornburg v. Gingles*, 106 S. Ct. at 2765-68,

and entered summary judgment in favor of the respondents.

The petitioners now challenge the district court's reliance on Dr. Maggiotto's affidavit. Petition at 48-52. The petitioners claim that (1) they should have been allowed to prove racial bloc voting by "totality of the circumstances" evidence as an alternative to a statistical analysis of voting records; and (2) Dr. Maggiotto's conclusions were based in part on his analysis of endogenous election contests in which no African-American candidate ran, despite the suggestion of the Fifth Circuit in *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987) that such evidence has a limited probative value.

These arguments, however, are without merit.

First, contrary to the petitioners' suggestion, there is nothing in this Court's recent opinions in *Growe v. Emison*, ___ U.S. ___, 113 S. Ct. 1075, ___ L.Ed.2d ___ (1993) or *Voinovich v. Quilter*, ___ U.S. ___, 113 S. Ct. 1149, ___ L.Ed.2d ___ (1993) which addresses the issue of the type of proof that properly can be used to establish the three *Gingles* preconditions. Those cases certainly do not stand for the proposition that racial bloc voting can be proven by "totality of the circumstances" evidence, without any statistical analysis of election results, under circumstances such as those present in the instant case. Here, there was an abundance of objective data directly relevant to the issue of whether racial bloc voting usually affects the outcome of elections in Orange County. Following the filing of the respondents' summary judgment motion, the petitioners simply were unable to rebut the respondents' conclusions drawn from that data.

Second, Dr. Maggiotto's analysis was not flawed due to its being based *in part* on election results from endogenous contests in which there was no African-American candidate. That portion of Dr. Maggiotto's analysis merely served to corroborate his conclusion drawn from the analysis of numerous exogenous contests in which there were African-American candidates. This fact constitutes a critical distinction between the instant case and *Gretna, supra*. Because of this distinction, there is no conflict between the Eleventh Circuit's opinion in the instant case and the Fifth Circuit's opinion in *Gretna*.

C. The Petitioners Were Afforded Full Discovery Rights And An Ample Opportunity To Proffer Evidence In Opposition To The Respondents' Summary Judgment Motion

The petitioners claim that they were "denied access to key witnesses and information." Petition at 56. The record indicates otherwise. The election data upon which Dr. Maggiotto based his analysis was equally available to the petitioners. The petitioners had their own expert statistician, who was retained in connection with the motion for injunctive relief. Had the petitioners' expert been in a position to refute Dr. Maggiotto's conclusions, he undoubtedly would have done so, especially since the petitioners were given 25 additional days to frame their response.

The petitioners also complain that they were deprived of a discovery conference under Fed.R.Civ.P. 26(f). The ordering of a discovery conference, however, is within the sound discretion of the district court, *Bluitt v.*

Arco Chemical Co., 777 F.2d 188 (5th Cir. 1985), and is not required unless the requesting party first complies with certain statutory prerequisites. Here, the petitioners made no attempt whatever to comply with the statutory prerequisites. The district court properly denied the motion without comment, and the denial was not appealed to the Eleventh Circuit.

Finally, the petitioners protest that they have been deprived of "access to the federal judicial system." Petition at 57-59. In the context of their other arguments, it is clear that the petitioners equate "access" with a trial on the merits. The petitioners, however, were not entitled to such a trial. They filed a baseless lawsuit and then were not able to muster any evidence to support their claims. Summary judgment was the appropriate disposition. The district court so found, and the Eleventh Circuit affirmed. There is absolutely no reason for this Court now to involve itself in the rulings by the courts below.

CONCLUSION

For all of the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

CHARLES G. BURR
Counsel of Record
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

A. BRYANT APPLEGATE
Orange County Legal Department
201 S. Rosalind Avenue
5th Floor
Orlando, Florida 32801
(407) 836-7320